

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S154 of 2019

B E T W E E N

WESTPAC BANKING CORPORATION
First Appellant

WESTPAC LIFE INSURANCE SERVICES LIMITED
Second Appellant

AND

GREGORY JOHN LENTHALL
First Respondent

SHARMILA LENTHALL
Second Respondent

SHANE THOMAS LYE
Third Respondent

KYLIE LEE LYE
Fourth Respondent

JUSTKAPITAL LITIGATION PTY LIMITED
Fifth Respondent



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Outline of Oral Argument of First to Fourth Respondents

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Part I: Publication

1. This outline is in a form suitable for publication on the internet.

Part II: Propositions to be advanced

2. **Part IVA generally:** The Part authorises the self-appointed representative to define and constitute the class, bringing group members together into a common enterprise in which the representative will litigate on their behalf the common questions (and potentially the whole of their claims), without the need for their consent or instructions, subject to their rights to “opt out” and receive notices: FCA Act, ss. 33C, 33E, 33H, 33J, 33V, 33X, 33Y, 33ZB.

3. The Part also confers on the court a broad supervisory or protective function over the representative’s conduct of the common enterprise: ss 33J – 33Z.

4. Part IVA provides a vehicle for the vindication of multiple choses in action where separate proceedings are likely to be uneconomic; thereby promoting “open” (and “closed”) class actions, facilitating access to justice and minimising competing claims (1-4R [6]-[9]).

- ALRC, *Grouped Proceedings in the Federal Court*, Report No 46 [108], [126]-[127]
- *Femcare v Bright* (2000) 100 FCR 331 at [10], [56]-[65], [75], [108]-[109]

5. **The necessary role of service providers:** A Part IVA action needs lawyers and some person(s) to take on the risks (ie. own costs, contingent liability for respondent’s costs, security for costs). Post *Fostif*, there is no objection to an external funder taking on the risks in exchange for remuneration (ie. reimbursement of expenses and a risk premium).

- ALRC, *Grouped Proceedings in the Federal Court*, Report No 46, [289], [293]
- *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, [83]-[95]

The representative’s authority under the Part extends to the selection of the lawyers /funder and the provisional establishment of their remuneration. The court retains authority, under its supervisory jurisdiction, over the reasonableness of such rewards (1-4R [10]-[13]).

6. **Powers available to the court on settlement or judgment:** Part IVA authorises the representative to make settlements of the claims of group members, or seek judgments on their claims, in a manner which may involve pooling of their claims and appropriate remuneration for service providers, subject to the court’s control: ss. 33V, 33Z, 33ZA, 33ZJ.

7. A CFO can be made on settlement or judgment (binding group members who have not chosen to opt out) as a response to three inter-related demands of justice widely recognised at general law: (a) to avoid unjust enrichment: those whose services have resulted in a successful recovery for others are entitled to reasonable remuneration; (b) in equity: as a lien; and (c) in equity: the burden may be spread rateably across the recoveries of all who benefit.

8. **The Funding/Retainer agreements:** (a) Constitute an act of the representative, within power, requesting JKL/Shine to provide the services of funding and/or legal representation for the benefit of the group; and (b) establish the provisional terms on which they will be remunerated, including a CFO application, subject to the court's control.

9. **Terms of the CFO:** The CFO (and associated undertakings) establish, on an interlocutory basis: (a) the terms going forward on which the funder and the lawyers will bear the costs of the proceedings to the benefit of the representative and group; (b) that the provisions of such services will entitle the funder/lawyers, should the proceedings be successful, to specified remuneration to be paid out of a common pool and thus rateably borne
10 by all group members; (c) that the remuneration to the funder includes both recoupment of costs incurred and a premium for the taking of risk (1-4R [14]-[17]).

10. The context for the CFO is: (a) a large number of small claims which are uneconomic to litigate separately and so are virtually valueless; (b) the proceedings require some form of funding to be efficacious; (c) the commitment of the funder and lawyers to take on the risks of the proceedings provides a "stable base of funding"; and (d) the CFO, rather than diminishing group members' choices in action, enables their value to be realised (1-4R [18]).

11. **Construction of s 33ZF:** A valid order must take into account the objects and purposes of Part IVA, the court's express powers and all of the circumstances. The CFO responds to three demands of justice in the proceedings: (a) the immediate establishment of terms between funder, lawyers, representative and group to govern the costs of the proceedings going forward, terms consistent with the demands of justice which will justify a CFO on a final basis if the proceedings are successful (cf [7] above); the informational aspect of justice, enabling group members better to exercise their s 33J rights; and (c) access to justice, in that a risk to the ongoing prosecution of the proceedings is removed. There is no difference in principle between recognising that all group members should share the burden of solicitors' costs (including any uplift) and recognising that they should share the burden of the funder's fees. There is no "existing expense" limitation (1-4R [24]-[30], [44]).

- *Stewart v Atco Controls Pty Ltd (in liq)* (2014) 252 CLR 307, [17]-[23]
- *IMF (Australia) Ltd v Meadow Springs* (2009) 253 ALR 240, [63]-[73], [79]
- 30 • *Shirlaw v Taylor* (1992) 31 FCR 222, 228-231; *Re Masters* [1953] 1 WLR 81, 83
- *United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC* (2007) 163 FCR 183, [32]-[34]
- *Awarding Attorneys' Fees and Managing Fee Litigation* (3rd ed, 2015) p 67, 80-95
- *Central Railroad & Banking Co v Pettus* 113 US 116 (1885)

12. The above construction: (a) is supported by the liberality of the language of s 33ZF (1-

4R [21]); (b) is consistent with the principle of legality, because the CFO does not diminish the value of group members' choses in action but enables their value to be realised (1-4R [22]-[23]); and (c) would not undermine the powers under s. 33V or s. 33Z, accepting they would also permit a CFO at settlement or judgment (1-4R [31]-[35]).

- *Cf Jackson v Stirling Industries* (1987) 162 CLR 612 at 617, 619, 621, 625

10 13. **Judicial power:** The court has jurisdiction in a “matter”, being whether any members of the class are entitled against the Respondent to relief on the claims which are united by the common questions as articulated by the representative in the application. Section 33ZF is one of a range of powers given to the court which, by its terms, will necessarily lead to an order made under judicial or incidental to judicial power. It suffices that: (a) the power is given to a court; (b) to be exercised in accordance with, and as an incident of, the judicial process; (c) under a general standard tethered to doing justice in a proceeding. The court is not authorised to exercise the power on considerations of mere policy or administration (1-4R [37]-[42]).

- *Cominos v Cominos* (1972) 127 CLR 588 at 591, 593-595, 599-600, 604-606, 608-609
- *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 189-191

20 14. If the focus is specifically on the CFO, it is judicial or incidental to judicial power: it is made within the court's supervisory jurisdiction, ensuring justice between the representative, class and service providers in the enforcement and ultimate resolution of claims in a matter in which the court has jurisdiction, by analogy with the court's supervisory jurisdiction over an administration and the court's general powers over costs of a matter.

- *Palmer v Ayres* (2017) 259 CLR 478 at [47]-[50], [84]-[89], [99]

15. While historical or present-day analogies are not necessary, they amply exist. By contrast, remuneration tribunals provide no analogy (1-4R [43]-[46]).

16. **Section 51(xxxi):** Section s 33ZF, insofar as it validly supports any order, will necessarily escape s. 51(xxxi). It is not properly characterised as a law with respect to the acquisition of property; the provision of just terms is incongruous with the power (1-4R [48]-[52]). Additionally, s 51(xxxi) is not engaged in respect to this order because the CFO enables the value of group members' choses in action to be realised (1-4R [47]).

- *Mutual Pools & Staff Pty Ltd v Cth* (1994) 179 CLR 155 at 169, 171, 177, 185-186-189
- 30 • *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160
- *Cunningham v Cth* (2016) 259 CLR 561 at [57]-[63]
- *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at [95]-[101], [492]-[503], [517]-[519]